HIGH COURT OF PUNJAB & HARYANA AT CHANDIGARH

C.R.No.3653 of 1985
Date of decision : 9.5.2007

Amar Singh and others **.....Petitioners**

versus

Kaka Singh and others **.....Respondents**

CORAM : HON'BLE MR. JUSTICE HEMANT GUPTA.

Present: Ms.Alka Sarin, Advocate the petitioners.

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JUDGMENT

HEMANT GUPTA, J.

The challenge in the present revision petition is to the order passed by the learned trial Court on 12.3.1984 whereby an application for passing of the final decree in respect of the land measuring 10K-17M was dismissed holding the same as beyond the period of limitation. The said order was affirmed by the learned First Appellate Court on 17.8.1985.

A preliminary decree in a suit for redemption was passed by the learned trial Court on 24.12.1968 in respect of the land measuring 32 K-7M. The preliminary decree for the land measuring 10K-17 was passed in favour of Lal Singh plaintiff on payment of Rs.1188.25 to Kaka Singh and Bachan Singh defendants and Rs.1765.25 was to pay by Hari defendant for the land measuring 21K-10M to the aforesaid mortgagees. The aforesaid amount was to be deposited on or before 22.3.1969. The said application was filed by the legal representatives of Lal Singh. The said decree was amended on 16.3.1976 .

It was pointed out that Lal Singh, decree holder deposited the amount of Rs.1182.25 on 19.3.1969 for payment to the defendants Kaka Singh and Bachan Singh. Lal Singh died on 24.2.1977. Therefore, the possession was sought after passing a final decree in respect of which the application was filed on 15.6.1981. The defendants took up a stand that the application is time barred as the amount was deposited on 19.3.1969. Reliance was placed on ***Subramaniam Chettiar and another versus Muthiah Pillai, AIR 1957 Madras-189*** and ***Smt.Amiya Debi and others versus Ranendra Narayan Saha and others, AIR 1983-Calcutta-24***. The Court found that the limitation for passing a final decree is 3 years from the deposit of the mortgage amount and thus, the application is time barred. In appeal, reliance was placed on ***Angammal versus V.K.M.Muhammad Sulaiman Lebbai and another, AIR-1946-Madras-38*** and ***Om Parkash and another versus Dewan Chand and others, AIR 1964-Punjab-413***, on behalf of the petitioner to contend that there is no period of limitation prescribed under Order 34, Rule 8 of the Civil Procedure Code for making the application for final decree. The learned First Appellate Court found that judgment in Angammal's case (supra) has been distinguished by the later judgment in Subramaniam Chettia's case (supra). As per the aforesaid judgment, the application for final decree ought to be made within 3 years from the date of deposit.

Before this Court, the learned counsel for the petitioner has raised two fold arguments. Firstly, it is contended that the limitation for final decree would arise from the date the preliminary decree was affirmed by this Court in Regular Second Appeal on 2.3.1983. It is pointed out that

the judgment and decree dated 24.12.1968 though amended on 6.3.1976, but was subject matter of challenge in appeal. The first appeal was decided on 11.1.1974 and the plaintiff's second appeal Nos.1794 of 1974 and 1795 of 1974 were dismissed on 2.3.1983. It is contended that keeping in view the doctrine of merger, the trial Court decree stood merged with the decree passed by this Court on 2.3.1983 and the limitation, if any, would commence from the aforesaid date. Leaned counsel for the petitioner relied ***Union of India and others versus West Coast Paper Mills Ltd and another, 2004 (2) Supreme Court Cases-747.*** In the said case, the order of Railways Claims Tribunal, though final under the Act, was held to be merged with the order passed by the Hon'ble Supreme Court of India after the Special Leave Petition was granted. The relevant extracts of the judgment are as under:-

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> 13. It may be true that by reason of Section 46-A of the Indian Railways Act, the judgment of the Tribunal was final but by reason thereof the jurisdiction of this Court to exercise its power under Article 136 of the Constitution of India was not and could not have been excluded.
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> 14. Article 136 of the Constitution of India confers a special power upon this Court in terms whereof an appeal shall lie against any order passed by a Court or Tribunal. Once a special leave is granted and the appeal is admitted, the correctness or otherwise of the judgment of the Tribunal becomes wide open. In such an appeal, the Court is entitled to go into both questions of fact as well as law. In such an event, the correctness of the judgment is in

jeopardy.

15. Even in relation to a civil dispute, an appeal is considered to be a continuation of the suit and a decree becomes executable only when the same is finally disposed of by the Court of appeal.

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42. It has not been and could not be contended that even under the ordinary civil law the judgment of the appellate court alone can be put to execution. Having regard to the doctrine of merger as also the principle that an appeal is in continuation of suit, we are of the opinion that the decision of the Constitution Bench in S.S.Rathore was to be followed in the instant case."

In ***Chandi Prasad and others versus Jagdish Prasad and others, 2004 (8) Supreme Court Cases-724,*** the Court found that when the appeal is prescribed under a statute and the appellate forum is invoked and entertained, for all intent and purposes, the suit continues. The Court held to the following effect:-

"xx xx xx xx

23. The doctrine of merger is based on the principles of propriety in the hierarchy of the justice delivery system. The doctrine of merger does not make a distinction between an order of reversal, modification or an order of confirmation passed by the appellate authority. The said doctrine postulates that there cannot be more than one operative decree governing the same subject matter at a given point of time.

24. It is trite that when an appellate court passes a decree, the decree of the trial court merges with the

> decree of the appellate court and even if and subject to any modification that may be made in the appellate decree, the decree of the appellate Court supersedes the decree of the trial Court. In other words, merger of a decree takes place irrespective of the fact as to whether the appellate Court affirms, modifies or reverses the decree passed by the trial Court. When a special leave petition is dismissed summarily, doctrine of merger does not apply but when an appeal is dismissed, it does."

Thus, the limitation for the purpose of preparing the final decree will commence from the date of dismissal of the second appeal on 2.3.1983. As a matter of fact, the petitioner has moved an application for preparation of the final decree in the year 1981 and, thus, the application cannot be said to be barred by limitation.

The other such argument is that there is no period of limitation for redemption of usufructuary mortgage under Order 34, Rule 8 of the Civil Procedure Code. It is contended that in a suit for possession by way of redemption of usufructuary mortgage, the plaintiff can make payment of the redemption money at any time before the date of final decree debarring him of rights to redeem or before the date of confirmation of sale. In ***K.Parameshwaran Pillai versus K.Sumathi @ Jesis Jessie Jacquiline and another, 1993 (4) Supreme Court Cases-431,*** the right of the plaintiff in case of usufructuary mortgage was found to be thus:-

> "4. xx xx xx The resultant operation of the law would be that in the case of usufructuary mortgage, the

plaintiff need not make any application for extension of time fixed in the preliminary decree. The mortgagee/defendant has no right to make an application to foreclose the right of the plaintiff or sale of hypotheca declaring that the plaintiff has been debarred from making payment in court or to proceed further. At any time before passing of final decree or confirmation of the sale held in pursuance of the final decree the plaintiff usufructuary mortgagor has been given right to make payment of the redemption money due under preliminary decree and the subsequent liability incurred thereon. The outer limit for making such payment is passing of the final decree or confirmation of the sale made in furtherance thereof. The final decree for foreclosure or sale or redemption in relation to other mortgages, the right to payment has been hedged with the duty to deposit the money declared or quantified in the preliminary decree within the time specified under the preliminary decree or extended period from time to time till final decree debarring the plaintiff from redemption etc. is passed. The outer limit for a usufructuary mortgagor for making payment of the amount due under the preliminary decree, thereby, is passing of the final decree or the date of confirmation of the sale.

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6. In the case of usufructuary mortgage clause (*a*) of sub-rule (3) of Rule 8 expressly excludes the right to the mortgagee to apply for foreclosure or sale or redemption. Necessary consequence is that so long as the right subsists, though there is delay in compliance of the condition imposed in the preliminary decree, the right of redemption to the mortgagor is not lost. It will be barred only on expiry of the period of limitation

prescribed under the Limitation Act. The reasons are obvious. Order 34 Rule 8(3) does not give any right to the mortgagee but the right is given only to the mortgagor, to seek redemption of the usufructuary mortgage in a decree under Rule 8(3) of Order 34. The mortgagee, having been in possession and enjoyment of the hypotheca is not disabled by the preliminary decree. On the other hand the liability continues to subsist against the mortgagor. Therefore, it is up to the mortgagor to redeem the mortgage. Till then his liability under the mortgage continues to run on the estate. It is, therefore, clear that the limitation to file an application under Order 34 Rule 8(1) to pass a final decree for redemption, other than the preliminary decree for redemption of usufructuary mortgage, starts running and continues to run its course from the date of expiry of the period fixed in the preliminary decree, unless it is stayed or suspended or the time prescribed in the preliminary decree is extended by an order of the court. In its absence on expiry of the limitation of three years from the date fixed in the preliminary decree expired under Article 137 of the Schedule to Limitation Act, 1963 (Article 181 of Schedule I of Old Act), the plaintiff is debarred to enforce the right to pass the final decree. *But in the case of preliminary decree for redemption of usufructuary mortgage no limitation begins to run until deposit is made though there is a conditional preliminary decree and default was committed by the mortgagor for compliance thereof."* (Emphasis supplied).

Still later, In ***Achaldas Durgaji Oswal (dead) versus Ramvilas Gangabiswan Heda and others, 2003 (3) S.C.C.-614,*** the

Court has considered the judgment in Subramaniam Chettiar's case (supra) relied upon by the Courts below i.e. 1957 Madras-189, wherein a view has been taken that the period of limitation provided under Article 137 (old 181) starts from the date of deposit. It was held that the Order 34, Rules 7 & 8 of the CPC did not confer any right on the usufructuary mortgagee to apply for final decree which is conferred on the mortgagees of the other types of mortgages. The mortgagor is entitled to make an application for final decree at any time. By reason of sub-rule 1 of Rule 8 of Order 34 of the CPC, the right of redemption is conferred upon the mortgagor of usufructuary mortgage as such provision has been made having regard to the fact that usufructuary mortgages would be entitled to possession to the property in question till the final decree of redemption is passed. It was also held that the right of payment can be exercised at any time before the sale is affirmed, although the final decree might have been passed in the meanwhile. It is so held as under:-

> **"23.** A right for obtaining a final decree for sale or foreclosure can be exercised only on payment of such money. Such a right can be exercised at any time even before the sale is confirmed although the final decree might have been passed in the meanwhile. The mortgagee is also not entitled to receive any payment under the preliminary decree nor is the mortgagor required to make an application to recover before paying the same.
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> **36.** We are therefore, of the opinion that although by reason of preliminary decree in the suit for redemption of usufructuary mortgage, the court may fix the time

> for payment of the amount declared due but default in depositing such payment would not debar him from a right to redeem the mortgaged property."

In view of the discussion made above, I am of the opinion that the order passed by the Courts below are patently illegal, suffers from material irregularity and has caused manifest injustice to the petitioner. Consequently, the present revision petition is allowed. The order passed by the Courts below is set-aside. The petitioner is found entitled to decree for possession as the mortgage amount already stands deposited.

(HEMANT GUPTA)
JUDGE

May 9, 2007
**mohinder*